No. 12,250

IN THE

United States Court of Appeals

For the Ninth Circuit

VIRDIE SCHIEL, FRANK SCHIEL, SR., MARY LOU SCHIEL and LORRAINE SCHIEL,

Appellants,

vs.

NEW YORK LIFE INSURANCE COMPANY a Corporation,

Appellee.

PETITION FOR REHEARING

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COMES NOW New York Life Insurance Company, a corporation, appellee in the above entitled cause, and presents its petition for a rehearing of the above entitled cause, and in support thereof respectfully shows:

The Court has ruled that after lapse of the life insurance policy involved herein, and upon application of insured for reinstatement, appellee could not take into consideration the circumstances of insured relative to residence, travel, occupation and military and naval service for the purpose of satisfying itself as to his insurability. Because of the ruling of the Supreme

Court of Arizona in *Equitable Life Assurance Soc.* v. *Pettid,* 40 Ariz. 239, 11 P.2d 833, and its apparent disposition of any question as to the right of the company to determine insurability upon a consideration of all matters material to the risk in addition to personal good health we did not, in our brief or in oral argument, give more than passing attention to the issue with which the opinion of the Court deals. For that reason we deem it not only appropriate, but our duty, to ask for rehearing. We are confident that a reconsideration of the issue will show that the opinion of the Court is contrary to applicable Arizona law.

With respect to the term "insurability" in the reinstatement clauses of life insurance policies, there are two divergent rules. The first: That "insurability" embraces matters other than good health. Note particularly the decision of the Supreme Court of Arizona in the *Pettid* case, *supra* and the opinions of the Utah and Missouri courts which rely upon it.

> *Gressler* v. *New York Life Ins. Co.,* 108 Utah 173, 156 P.2d 212;
> *Kirby* v. *Prudential Insurance Co.,* (Mo.) 191 S.W.2d 379, 162 ALR 660.

The second: That "insurability" is not more comprehensive than the term "good health." This rule stems from *Sussex* v. *Aetna Life Insurance Co.,* 38 Ont. L. Rep. 365, 33 DLR 549. The author of the annotation found at 162 ALR 668 reconciles the rules as follows:

> "The term 'insurability' as applied in the policy provision dealing with reinstatement embraces all matters which the insurer took into consideration when issuing the original policy, and only those. Thus, while 'insurability' is construed as having a broader meaning than 'good health,' it does not

permit the insurer to take into consideration, for the purpose of reinstating the policy, facts into which it did not inquire at the time the original policy was issued."

The author indicates that the *Pettid* case supports this view.

It is our impression, from the Court's opinion that the Court does not quarrel with the *Pettid* case and the interpretation placed upon it by the Utah and Missouri courts in the *Gressler* and *Kirby* decisions and by the author of the above mentioned Annotations. This court appears to take the position that the *Pettid* rule is made inapplicable by the inclusion in the insurance policy of the so-called "occupation clause." It seems clear that the Court's conclusion was prompted by the attempt of the Missouri court, in the *Kirby* case, to distinguish the *Sussex* case on the basis of the occupation clause. We are quite certain that an analysis of the occupation clause will demonstrate that it cannot qualify or limit the reinstatement clause in this respect.

It is self-evident that when a life insurance policy lapses, its remaining vitality (outside of nonforfeiture value, if any) resides solely in the reinstatement clause. The surviving rights of the insured (ignoring forfeiture values, if any) are measured by such clause and not by any other portion of the policy—such other portions are dormant. Under the reinstatement clause the insured is entitled to reinstatement if (1) he pays the overdue premiums and (2) presents evidence of insurability satisfactory to the company. In this context what is meant by "insurability"?

"Insurability" means "capable of being insured." Whether or not a person is capable of being insured depends upon a consideration of all factors material to

the risk. The number of such factors is in direct proportion to the scope of the coverage, i.e. risk to be assumed. In other words, if the coverage is limited such factors will be few. As coverage increases so do the factors material to the risk. If, for example, a policy of insurance covers only injuries sustained while riding upon a railroad train, the only factor material to the risk would be the insured's likelihood of using such means of conveyance and the frequency thereof. On the other hand, if a policy of insurance covers death from any cause, then any facts or circumstance which would increase or decrease such hazard would be material to the risk assumed. Therefore, although the reinstatement clause is self-contained, we are permitted to look at the insuring clauses of the policy to determine the scope of the risk which the company is asked to reassume.

In the instant case the policy (ignoring the suicide and double indemnity provisions) was unlimited. The face amount of the policy was payable upon the death of the insured from any cause or by any means. Before accepting such a comprehensive risk, appellee required the applicant to undergo a physical examination and to answer numerous questions relative to his occupation, residence, intentions as to travel, aeronautic activities, consumption of spirits, etc. (R. 17). The appellee considered all such factors to be material to the risk which it was asked to assume. It cannot be contended that such practice was at variance with standard life insurance procedure. The policy was issued and thereafter lapsed for non-payment of premium. Insured asked for reinstatement to which he was entitled upon payment of delinquent premiums and a showing of evidence of insurability satisfactory to appellee. The dormant insuring provisions of the policy were exactly

the same as they were when the policy was originally issued. The scope of the risk which appellee was asked to reassume was exactly the same as it originally assumed. The factors material to the risk to be reassumed were the same as the factors material to the risk originally assumed. Under such circumstance insurability with respect to reinstatement could mean nothing more nor less than insurability with respect to original issue. Appellee thus entered upon a consideration of exactly the same factors it had considered when the policy was originally issued and found that the hazards of the insured's death had increased by reason of a change in insured's circumstances with respect to participation in aeronautics. (R. 17, 18). It decided that insured was not now insurable upon the basis of unlimited coverage.

Contrary to the conclusion reached in the Court's opinion, appellee was not precluded by the so-called "occupation clause" from considering any and all factors material to the risk which it had considered when the policy was originally issued. The occupation clause is merely a statement of fact:

> "This policy is free of conditions as to residence, travel, occupation and military and naval service, except as to provisions and conditions relating to double indemnity and disability benefits." (R. 13).

The clause does not in anywise extend or restrict the coverage of the policy or the liability of the appellee thereunder. The purpose of the clause is—from a sales standpoint—to call attention to the applicant that the policy is unlimited as to coverage, and that he can engage in any occupation, reside or travel anywhere, or join the army or navy without affecting the liability of appellee to pay the face amount of the policy upon

his death. The liability of the appellee would have been exactly the same whether such clause were included or excluded. As the inclusion or exclusion of the clause from the policy does not change the scope of coverage, it is clear that its inclusion or exclusion cannot change the meaning of "insurability".

The following example will show why the occupation clause cannot be deemed to modify the term "insurability" in the reinstatement clause. Let us assume that the occupation clause is amplified to read:

> "This policy is free of conditions as to residence, travel, occupation, contraction of or exposure to disease, consumption of spirits, financial or domestic difficulties, social habits and military and naval service."

The contractual force of our amplified clause is no greater nor less than as originally written. It merely gives greater emphasis to the unlimited coverage of the policy. It makes clear to the insured that no matter how circumstances may change, his insurance protection shall in nowise be limited. Let us further assume that the policy lapses and on application for reinstatement the company ascertains that the applicant, originally an accountant in good health, is now suffering from cancer, is drinking to excess and has changed his occupation to that of a movie stunt man. The company refuses reinstatement, but offers to issue a policy similar to that which has lapsed but modified to the extent that in the event of death resulting directly or indirectly from cancer, stunting accidents or drinking, only a restricted amount will be payable. The applicant then takes the position that this is an offer of reinstatement and that under guise of reinstatement the company is undertaking to rewrite the contract in such fash-

ion as to repudiate risks assumed at the outset. He points out that if the company can do this it can with equal facility exclude altogether any and all other risks referred to in the "occupation clause", whereas his liberty of action in all such matters was a measure of his insurability fixed and determined by the terms of the original contract. The patent absurdity of such contention makes it startlingly clear that "insured's liberty of action" in all those matters (his right to contract or expose himself to any disease, to drink intoxicating liquors, to engage in any hazardous occupation whatsoever, etc.) is not a measure of insurability—it is a measure of the company's liability—a liability which terminates upon lapse. We have seen that if such liberty of action has any bearing whatsoever upon insurability it is to increase rather than limit the factors material to the risk upon a consideration of which insurability is determined. A contrary construction of our hypothetical "occupation clause" would mean that because the company had assumed an unlimited risk at the outset it must, after lapse and upon payment of delinquent premiums, reassume that risk no matter to what extent the hazard of death had increased. If such construction were correct, there would be no purpose in the Company including the condition regarding the requirement of evidence of insurability in order to effect a reinstatement.

In its opinion the Court states:

> "The company made no claim that Schiel had become uninsurable for ordinary life purposes in the amount originally written; in fact it conceded by its conduct that he was insurable for those purposes and in that amount. It declined, however, to reinstate the ordinary life policy except upon a

> condition importing a concept of insurability at variance with the policy as written. This, we think it might not do."

We believe that the above quoted statement was prompted by the decision of the Supreme Court of Illinois in *Kahn* v. *Continental Casualty Company,* 391 Ill. 445, 63 N.E.2d 468. In that case the insurance company refused to reinstate except upon condition that the benefits of the policy be reduced or that insured make like reductions in similar policies which insured had subsequently taken out. The court pointed out that the company at all times had treated the insured as insurable and that the company conceded insurability by offering to reinstate the policy *in its original form* on condition that insured would reduce or cancel his other insurance.

In the case at bar appellee did not concede insurability. At no time did it offer to reinstate the policy *in its original form.* The condition which it imposed was the exclusion of insurance coverage during participation of insured in aviation. The effect of appellee's offer was a rejection of the application to reinstate the policy in its original form and an offer to issue what would amount to a different contract.

Insured's participation in aviation was a factor which appellee considered at the time the policy was issued. It appeared from the original application that insured did not intend to engage in such activity. It is true that after the policy was issued (and prior to lapse) insured was free to engage in any activity whatsoever without jeopardizing his insurance, but after lapse insurer had no obligation to reinstate upon a consideration of insurability any different from that which it had originally applied. If the original application

had disclosed insured's intention to engage in aviation and the application for reinstatement likewise showed such intent and if appellee had refused to reinstate except upon inclusion of the aviation clause, then the following language of the Court would have been applicable:

> "It (appellee) declined, however, to reinstate the ordinary life policy except upon a condition importing a concept of insurability at variance with the policy as written" —

at variance with the concept of insurability adopted by appellee in writing the policy. The same can be said if the original application showed that insured was suffering from tuberculosis and the application for reinstatement showed the same condition. An offer to reinstate upon condition that death from tuberculosis be eliminated as a risk, would import a concept of insurability at variance with the underwriting practice of the company. No one would suggest, however, that such condition would import a concept of insurability at variance with the policy as written if the tubercular condition was not shown to exist at the time of the original application.

We submit that the concept of insurability as disclosed by the policy and insurer's practice in passing upon risks includes the principle that active participation in aviation precludes insurability under an unlimited contract.

We have not undertaken an analysis of all decisions dealing with "insurability" in reinstatement clauses for the reason that the Court appears to have reached its conclusion solely upon the basis of the inclusion of the so-called "occupation clause." We have seen that the so-called "occupation clause" has to do with insur-

ance coverage not insurability. If the decision of this Court is to stand it must be bottomed upon the *Sussex* rule, i.e. that "insurability" is not more comprehensive than the term "good health." That rule does not prevail in Arizona.

We respectfully submit that this case is governed by the Arizona law as announced in the *Pettid* case and applied to a substantially identical situation by the Missouri court in the *Kirby* case. We summarize our position:

(a) Upon application for reinstatement, appellee had the right to inquire into all matters which it took into consideration when issuing the original policy;

(b) At the time the policy was originally issued, appellee inquired as to the insured's intention with respect to participation in aviation;

(c) Appellee made the same inquiry upon application for reinstatement and learned that the hazard of death had been increased by reason of insured's intention to engage in military aviation;

(d) Appellee refused to reinstate the policy in its original form. This constituted a rejection of the application for reinstatement;

(e) Appellee offered to reinstate the policy in modified form—with risk of aviation death excluded;

(f) Insured accepted appellee's offer and reinstatement of the modified policy was effected;

(g) As appellee had the right to reject the application for reinstatement it conclusively follows that it had the right to offer reinstatement of a

modified contract (in effect a new contract) in any form that it desired.

WHEREFORE, upon the foregoing grounds it is respectfully urged that this Petition for Rehearing be granted and that judgment of the lower court be, upon further consideration, affirmed.

Respectfully submitted,

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By JOSEPH S. JENCKES, JR.

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CERTIFICATE OF COUNSEL

I, counsel for the above named appellee, do hereby certify that in my judgment the foregoing Petition for Rehearing of this cause is well founded and that it is not interposed for delay.

JOSEPH S. JENCKES, JR.